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RESEARCH ARTICLE

A right to live without stigma? Examining negative stereotyping, negative messages, and Article 8 of the European Convention on Human Rights

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Abstract
The purpose of this paper is to examine the contours of evolving jurisprudence on offensive expression and negative messages, and to suggest that it can best be understood by reference to the concept of stigma. At the European Court of Human Rights, there appears to have been an increasing willingness to recognise the harm of offensive expression through an interpretation of Article 8 of the European Convention on Human Rights, but the reach of this case law remains uncertain. In particular, while some cases associate negative expression with negative stereotyping, not all of these cases do, and there are potential conflicts with freedom of speech. In the domestic context, these issues recently arose in a significant case from the Court of Appeal, *R (Crowter) v Secretary of State for Health and Social Care*. In this case, the appellants argued that a legal provision sends a negative 'message', through the negative stereotyping of disabled people, but this 'message' is implicit, rather than explicitly articulated. While these developments raise important questions about the future evolution of case law, we propose that a focus on stigma can more clearly highlight the harms involved.

Keywords: human rights law; Article 8; stigma; stereotypes; *Crowter*; freedom of expression

Introduction

In a number of recent cases from the European Court of Human Rights (ECtHR), there have been important developments in the Court's approach to offensive speech. Under Article 10 of the European Convention on Human Rights (ECHR), individuals have a right to freedom of expression, but states are entitled to place limits on this right, to some extent, in order to tackle hateful speech.[1] Recently, however, it appears that the ECtHR has been recognising that in some circumstances states are not only *entitled* to restrict hateful speech, but in fact have *obligations* to do so, through an interpretation of Article 8 of the ECHR, which provides a right to respect for private and family life.

This evolving jurisprudence raises a number of questions, including with respect to the potential reach of the protection against offensive or hateful expression. While many of the cases found that this expression involved negative stereotyping, there are reasons to analyse further why this harm in particular was singled out. Furthermore, not all these ECtHR cases were explicitly concerned

[†]We would like to thank the anonymous reviewers at Legal Studies, as well as the Editors, for their very helpful comments on an earlier draft of this paper, and for their valuable guidance.

[1]On the state's entitlement to restrict free speech in some circumstances, see Art 10(2) of the ECHR. We will return to this issue later.

with stereotypes, and therefore it is worth considering whether there could be another harm that might more helpfully tie these cases together. It might not be immediately clear, in particular, how related concepts might be engaged, such as prejudice, discrimination, or stigma.

These issues have also now been considered in the domestic context, in a recent and significant case from the Court of Appeal, *R (Crowter) v Secretary of State for Health and Social Care*.[2] The appellants in this case, who have Down syndrome, argued that a legal provision expressed a pejorative message which perpetuated and reinforced negative stereotypes about them and other disabled people. The negative message, in this case, was alleged to come from a provision in the Abortion Act 1967, which provides for lawful abortion on the grounds of disability. The appellants' position was that the law is sending a 'message' that disabled lives are less valuable, on the basis that the law singles out disability as a distinct ground for abortion, and that it allows abortion under this ground until birth.

While *Crowter* is a case that has been widely associated with the law on abortion, it must also be understood as a case that follows on from this recent ECtHR jurisprudence on offensive expression, and the appellants relied on this in their arguments. *Crowter*, however, is significantly different, in several ways. Importantly, while the ECtHR cases relied upon were concerned with negative statements or comments from third parties, the appellants in *Crowter* argued that the negative 'message' is in the law itself. Further, the alleged negative message is not explicitly stated, but is rather implied; the impugned legal provision does not expressly say that disabled lives are less valuable, but the appellants argued that this was nevertheless the 'message' that it can be taken to send. Although the appellants' case was dismissed, the Court of Appeal did appear to accept that a claim such as theirs could be made in the right circumstances, where a negative message in *the law*, and even an *implicit* message in the law, could lead to a violation of Article 8. This seems to be a significant development, as one might well think that there could be many negative messages implied in the law, and that therefore the Court's analysis could have wide-ranging implications.

In this paper, we examine the contours of this evolving jurisprudence from the ECtHR, as well as from the domestic context through *Crowter*, and suggest that it can best be understood as related to a right to live without stigma. While other related harms can be engaged – including stereotyping, prejudice, and discrimination – a focus on stigma can more clearly highlight the central harms involved, as well as indicate some necessary limitations to the right. It can also better explain the evolution of the case law, and help us predict its future development, including in the case of an implicit message.

The structure we will adopt in this paper is as follows. In Section 1, we will review the development of jurisprudence from the ECtHR on negative expression, and examine what harms are at issue in these cases. In particular, many, but not all, of these cases have focused on negative stereotyping, but it seems that there are other harms at issue as well, including stigma. In Section 2, we will develop our defence of the relevance of stigma. By reference to theoretical literature, we will distinguish this concept from others, and explain how the jurisprudence already does seem to reflect a concern for stigma specifically, whether explicitly or not. We will also examine how a protection from stigma can be related to an interpretation of the wording in Article 8. In Section 3, we will analyse *Crowter* in light of this ECtHR jurisprudence and our suggestion that it is best understood by reference to stigma, including in respect of the possibility that Article 8 could provide protection from implicit messages as well.

1. Examining negative stereotyping, negative expression, and stigma under Article 8

The ECtHR jurisprudence on negative expression and Article 8 does not necessarily focus explicitly on stigma. In a strand of cases, a specific identified focus has been on the harm of negative stereotyping, starting with and following on from a significant decision from the Grand Chamber of the ECtHR, *Aksu v Turkey*.[3] This case, from 2012, was subsequently referred to in a number of other ECtHR

[2][2022] EWCA Civ 1559 (hereafter, *Crowter*).

[3]Application Nos 4149/04 and 41029/04 (15 March 2012).

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cases, as well as in *Crowter*. Furthermore, in a number of other cases, there are similar concerns raised about negative expression, but with no reference to *Aksu*. As these cases appear to depend strongly on their particular facts, we aim here to draw out some of the most salient factors within them, which, we shall explain, can point to a concern about stigma.

(a) The evolution of case law under Article 8

In *Aksu*, the applicant, of Roma origin, had brought two applications based on negative stereotypes about Roma people. The first application focused on passages in an academic book, *The Gypsies of Turkey*, where the applicant said that Roma people were depicted as 'engaged in illegal activities, [living] as "thieves, pickpockets, swindlers, robbers, usurers, beggars, drug dealers, prostitutes and brothel keepers" and… polygamist and aggressive'.[4] The second application focused on the definition of the Turkish word *çingene* (gypsy) in two dictionaries, which included a pejorative meaning of 'miserly'. The ECtHR examined arguments that the applicant's rights were infringed under Article 8, which provides a right to respect for private and family life, as follows:

> Article 8
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Furthermore, the Court considered whether there was an interference with Article 14 taken in conjunction with Article 8. Article 14 is concerned with a prohibition of discrimination, in the following terms:

> Article 14
>
> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

It is important to note that at issue in this case was the alleged negative expression of third parties – ie non-state parties. It is well recognised that Article 8 imposes both negative and positive obligations on the state; while the central objective of the article is to protect individuals against arbitrary interference by public authorities, it may also require the state to take positive steps to promote a respect for private life, which can include the adoption of measures relating to the way that individuals engage between themselves.[5] In other words, a claim that the state has violated its positive obligations under Article 8 in the context of negative expression can be understood as a claim that the state has not taken sufficient steps to protect a person from the negative expression of private individuals.

Both of the applications were dismissed in *Aksu.* In relation to Article 14, the ECtHR said that the case did not involve a difference in treatment, given that the applicant had not succeeded in producing prima facie evidence that the publications in question had a discriminatory intent or effect.[6] It therefore proceeded mainly in analysing the case under Article 8, and ultimately held that the domestic courts had been entitled to find that the applicant's characterisation of the pejorative nature of the

[4]Ibid, para 14.
[5]This is confirmed for example in *Aksu*, ibid, para 59.
[6]Ibid, para 45.

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book was inaccurate,[7] and that the dictionaries legitimately recorded language as it was used.[8] Significantly, however, the ECtHR did accept that such negative stereotyping could interfere with Article 8, in the following key passage (with emphasis added):

> The Court reiterates that the notion of 'private life' within the meaning of Article 8 of the Convention is a broad term not susceptible to exhaustive definition. The notion of personal autonomy is an important principle underlying the interpretation of the guarantees provided for by Article 8. It can therefore embrace multiple aspects of the person's physical and social identity. … *In particular, any negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group's sense of identity and the feelings of self-worth and self-confidence of members of the group. It is in this sense that it can be seen as affecting the private life of members of the group.*[9]

Therefore, although the applications were dismissed in *Aksu*, the Court provided an important statement on the applicability of Article 8 in the context of negative stereotyping, although it is also significant that the Court said that this stereotyping must reach 'a certain level'.

It should be said as well that while the Court considered both Article 8 and Article 14 on negative expression in *Aksu*, it is well established that the protection from discrimination under Article 14 is not a freestanding right, and must be used in conjunction with another substantive provision in the Convention,[10] such as Article 8. For the purposes of this paper, therefore, we emphasise the importance of Article 8 in the context of negative expression, and of a potential right to live without stigma, even though the claimant may also seek to rely, in addition, on Article 14.[11]

While the applications were dismissed in *Aksu*, the case is nevertheless significant because the approach that was taken was subsequently applied in a number of other cases where, by contrast, an interference was found. In *Lewit v Austria*,[12] for example, a Holocaust survivor who had been deported to the Mauthausen concentration camp complained about an article in a journal in Austria entitled 'The liberated from Mauthausen as mass murderers' (*Mauthausen-Befreite als Massenmörder*). The article described the conduct of survivors, following their release in 1945, as '[r]obbing and plundering, murdering and defiling' and as criminals who 'plagued' the surrounding country. There was no effective remedy available to the applicant under Austrian law, and the ECtHR held that his rights under Article 8 had been infringed.

Furthermore, in two important and recent decisions, *Budinova and Chaprazov v Bulgaria*,[13] and *Behar and Gutman v Bulgaria*,[14] which concerned public statements involving anti-Roma or anti-semitic speech, the ECtHR found a violation of Article 8 read in conjunction with Article 14. The Court also provided further guidance on the interpretation of *Aksu*, and the 'level' of seriousness that must be reached. In particular, the Court said that:

> … where the allegation is that a public statement about a social or ethnic group has affected the 'private life' of its members within the meaning of Article 8 of the Convention, the relevant factors for deciding whether that is indeed so include, but are not necessarily limited to, (a) the

[7]Ibid, paras 69–70.

[8]See ibid, paras 84–86.

[9]Ibid, para 58.

[10]For explanation of this point and the operation of Art 14, see for example ECtHR 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention' (updated 31 August 2022), available at https://ks.echr.coe.int/documents/d/echr-ks/guide_art_14_art_1_protocol_12_eng.

[11]We note as well that stigma might be relevant under other articles of the ECHR, but we do not examine this here.

[12]Application No 4782/18 (10 October 2019). See also for example *R.B. v Hungary* Application No 64602/12 (12 April 2016); *Király and Dömötör v Hungary* App no 10851/13 (17 January 2017),

[13]Application No 12567/13 (16 February 2021) (hereafter *Budinova and Chaprazov*).

[14]Application No 29335/13 (16 February 2021) (hereafter *Behar and Gutman*).

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> characteristics of the group (for instance its size, its degree of homogeneity, its particular vulnerability or history of stigmatisation, and its position *vis-à-vis* society as a whole), (b) the precise content of the negative statements regarding the group (in particular, the degree to which they could convey a negative stereotype about the group as a whole, and the specific content of that stereotype), and (c) the form and context in which the statements were made, their reach (which may depend on where and how they have been made), the position and status of their author, and the extent to which they could be considered to have affected a core aspect of the group's identity and dignity.[15]

This guidance thus indicates that there are a great number of factors that could be relevant to the Court's determination. It is important for our examination on stigma that the Court mentioned the 'history of stigmatisation', but this was noted here as only one relevant factor among others. The Court also explained that none of these factors takes precedence, and it is the 'interplay of all of them' that leads to a conclusion on whether the level of seriousness is reached.[16] It also added that another important consideration could be the 'overall context of each case – in particular the social and political climate prevalent at the time when the statements were made'.[17] Although this guidance thus provides some indication of the general approach that the Court is taking, it is also clear that the decision in cases will be dependent on their particular facts, which might make it difficult to predict the outcome of a case in the future. It is certainly understandable that not all negative expression can be sufficiently serious to constitute an interference, but determining the 'level' of seriousness required does not seem straightforward.

In addition to these cases on negative stereotyping, some other recent developments indicate a similar willingness to explore related issues with respect to negative expression and Article 8, but without any explicit reference to *Aksu*. In *Beizaras and Levickas v Lithuania*, for example, a gay couple posted a picture online of themselves kissing, and a large number of offensive messages were posted underneath.[18] To give just two examples, they include: 'Burn the faggots, damn it' and 'I'm going to throw up – they should be castrated or burnt; cure yourselves, jackasses – just saying'. The ECtHR were clear that the posts 'affected the applicants' psychological well-being and dignity, thus falling within the sphere of their private life.'[19] The public authorities refused to use criminal or civil sanctions against the posters, and the Court found a breach of Article 8 combined with Article 14:

> the Court thus finds it established, firstly, that the hateful comments, including undisguised calls for violence by private individuals directed against the applicants and the homosexual community in general, were prompted by a bigoted attitude towards that community and, secondly, that the very same discriminatory state of mind was at the core of the failure on the part of the relevant public authorities to discharge their positive obligation to investigate in an effective manner whether the comments regarding the applicants' sexual orientation constituted incitement to hatred and violence; by downplaying the seriousness of the comments, the authorities at the very least tolerated them …[20]

In this case, the court did not refer to *Aksu*, but in *Budinova and Chaprazov* and *Behar and Gutman* it was thought that the approach in *Beizaras and Levickas* was relevant to consider more generally in relation to the applicability of Article 8, and the level of seriousness required.[21]

[15] *Budinova and Chaprazov*, above n 13, para 63, and *Behar and Gutman*, above n 14, para 67 (the passage in both cases is identical).

[16] Ibid.

[17] Ibid.

[18] Application No 41288/15 (14 January 2020) (hereafter *Beizaras and Levickas*).

[19] Ibid, para 117.

[20] Ibid, para 129. See also *Organization Accept and Others v Romania*, Application No 19237/16 (1 June 2021), where the court referred to the state's failure to address 'verbal abuse' as falling under Arts 8 and 14.

[21] *Budinova and Chaprazov*, above n 13, para 62, and *Behar and Gutman*, above n 14, para 66. Although there was no reference to *Aksu*, there was some reference to stereotypes in the decision.

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Also significant to the interpretation of Article 8 and the level of seriousness is the case of *F.O. v Croatia*.[22] The case involved a pupil who was late for a class and was told by a teacher he was 'a moron [*kreten jedan*], an idiot [*idijot*], a fool [*budala*], hillbilly [*seljačina*], a stupid cop [*žandar glupi*]'.[23] On other occasions the teacher called the pupil a 'fool'. The pupil suffered acute anxiety disorder. The court emphasised that Article 8 covered 'a person's physical and psychological integrity … and extends to other values such as well-being and dignity, personality development and relations with other human beings …' It acknowledged that '[i]n order for Article 8 to come into play, however, an attack on a person must attain a certain level of seriousness and be made in a manner causing prejudice to the personal enjoyment of the right to respect for one's private life'.[24] The court concluded that

> the insults to which the applicant was subjected by [the teacher] entailed his emotional disturbance, which affected his psychological well-being, dignity and moral integrity … Moreover, those insults were uttered in the classroom in front of other students and were thus capable of humiliating and belittling the applicant in the eyes of others. It should also be taken into account that the insults in question were particularly disrespectful towards the applicant and were perpetrated by a teacher in a position of authority and control over him.[25]

The court in reaching this conclusion emphasised that the victim was a minor and the comments were uttered by a person in authority.

From the above review of the case law, it does seem therefore that the ECtHR is willing to consider that negative expression from third parties can interfere with Article 8, in a variety of contexts. These appear to be significant developments. It is true that one important limitation is the interaction with free speech, and in many cases the Court will have to balance an applicant's right to respect for his or her private life against the importance of protecting freedom of expression, by reference to Article 10. Nevertheless, in a recent analysis of free speech cases, Jacob Mchangama and Natalie Alkiyiadou noted that the cases of *Aksu* and *Beizaras and Levickas* seem to have modified the previous understanding which is that states *may* limit freedom of expression under Article 10, but are not explicitly *obliged* to do so.[26] The developing jurisprudence on offensive expression under Article 8 thus seems to have affected the potential scope of Article 10.

(b) Identifying the harm in offensive speech and statements

While we can see more broadly that the case law seems to be recognising that the use of offensive expression can engage Article 8, there is some ambiguity as to how the cases can be tied together, and it is difficult to predict how future cases will be decided.

The first point to emphasise, in an attempt to understand the cases as a whole, is the Court's repeated emphasis that the impact of the stereotyping or negative expression must be of sufficient severity. Many insults will not reach that level. An example of a different case where the level was not sufficient was *Vučina v Croatia*.[27] In this case, a picture of the claimant was published alongside a statement which incorrectly said that she was the wife of the mayor. The Court found that while the claimant was distressed, and felt that her reputation had been harmed, this was not at a level relevant for Article 8.

[22]Application No 29555/13 (22 April 2021).

[23]Ibid, para 6. The reference to 'cop' was because the pupil's parent was a police officer.

[24]Ibid, para 58.

[25]Ibid, para 60.

[26]See J Mchangama and N Alkiviadou 'Hate speech and the European Court of Human Rights: whatever happened to the right to offend, shock or disturb?' (2021) 21 Human Rights Law Review 1008. For discussion of the balancing of rights under Arts 8 and 10 in the context of potentially offensive speech, see *Aksu*, above n 3.

[27]Application No 58955/13 (31 October 2019).

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There are two further points which we wish to highlight in relation to the required level of severity, and which we think can assist us in further understanding the case law, and its relevance to stigma, which we shall explore in more detail shortly. First, the jurisprudence indicates that the status of the person issuing an insult is important. In *Budinova and Chaprazov* and *Behar and Gutman*, one of the factors listed as relevant to the level of seriousness, as mentioned above, was 'the position and status of [the] author' of the negative statements.[28] In *F.O. v Croatia*,[29] weight was placed on the fact that it was a teacher who was making the remarks at issue, and it is unlikely that the words of a fellow pupil would be seen as carrying the kind of authority that would challenge a person's sense of identity. By contrast, a claim will be greatly strengthened if the stereotyping or stigma appears to represent the state's position, as could be the case where statements are made by politicians. In *Nepomnyashchiy v Russia*,[30] which is another case involving negative public statements and that referred to *Aksu*, the Court stated that it 'is of crucial importance that politicians, including parliamentarians, avoid making statements promoting hatred or intolerance in their public speech' and that there is a risk that public statements of high-ranking public officials 'may be perceived as the State's official position'.[31]

The second point we wish to highlight is that the impact of the terminology will be greater if targeted at a member of a group which is already maligned or disadvantaged within society. The misattribution in *Vučina v Croatia*[32] was not combined with currently existing negative attitudes towards the claimant, and she was not being associated with a disadvantaged group. By contrast, the boy in *F.O. v Croatia*[33] was being labelled with offensive terminology which drew on disablist attitudes, and in *Beizaras and Levickas v Lithuania*[34] the offensive remarks could be seen in the context of a cultural setting which was not supportive of the applicant's sexuality. In *Budinova and Chaprazov* and *Behar and Gutman*, the court referred to 'the characteristics of the group' as a factor to assess, and this included, as mentioned above, the group's 'vulnerability or history of stigmatisation, and its position vis-à-vis society as a whole'.

These two points are particularly important in understanding the nature of the claims at issue, because if the wider societal context and positions of power between the parties must be considered, there are stronger reasons to think that a central harm at issue is stigma.

2. A right to live without stigma

While the ECtHR jurisprudence on negative expression and Article 8 focused on several different harms, in this section we would like to explain why we think the concept of stigma would be particularly helpful as the law develops in this area. This is the case because, first of all, the concept of stigma often captures better the wrong at issue than other concepts, as we shall explain here by reference to academic literature. Secondly, we think that the jurisprudence examined above does already appear to be concerned – explicitly or not – with stigma, and that this interpretation is in line with the scope of Article 8.

(a) The harm of stigma

It is certainly understandable that negative stereotyping can be recognised as harmful. Stereotypes might be understood as a form of categorisation,[35] or beliefs that are widely accepted about certain groups of people,[36] and a reason to contest them is that they appear to limit an individual's identity

[28] *Budinova and Chaprazov*, above n 13, para 63, and *Behar and Gutman*, above n 14, para 67.
[29] Above n 22.
[30] Apps nos 39954/09 and 3465/17 (30 May 2023).
[31] Ibid, para 75.
[32] Above n 27.
[33] Above n 22.
[34] Above n 18.
[35] I Solanke *Discrimination as Stigma: A Theory of Anti-discrimination Law* (Oxford: Hart Publishing, 2017) p 20.
[36] A Timmer 'Toward an anti-stereotyping approach for the European Court of Human Rights' (2011) 11(4) Human Rights Law Review 707 at 708.

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to supposed group characteristics, which can impair their sense of dignity and their personal autonomy.[37] Through stereotyping, people are not seen as individuals, but are judged based on their membership of a group in a reductive manner. However, while all negative stereotyping of a group might be hurtful to members of the group, the harm involved is not always identical, and stereotyping may or may not be linked to deeper injustice within society; whereas any person can potentially experience negative stereotyping, not all persons can experience structural discrimination. Iyiola Solanke gives the example of young, white British men, who have been stereotyped in an article as drinking too much, and for being lazy, promiscuous, and rude.[38] While this can lead to offence to members of this group, Solanke remarks that they are 'neither tainted for life nor subjected as a result to discrimination', given that young, white British men are the most likely group to attend university and obtain the most important senior leadership positions in politics and industry.[39] As Catharine MacKinnon writes, there can be equal stereotyping about white men and black women, but the substance of the stereotype is not equal, as it can relate to the promotion of male dominance and white supremacy within society.[40]

Prejudice, by contrast, is a concept which relates to stereotyping, but it might best be understood as a negative attitude, usually originating in the minds of individuals.[41] Both stereotyping and prejudice can be distinguished from stigma if the latter is understood as including societal support through social power, as we shall explain further below.[42] Thus, a member of a stigmatised minority group can have prejudicial views about members of the majority in society, but it is still only the minority individual who experiences stigma, and not the members of the majority.[43] While prejudice refers to an attitude, it need not be supported by society.[44]

Discrimination also needs to be distinguished as having a separate meaning, which relates to differences in treatment based on group membership. While prejudice refers to an attitude, discrimination is best conceived as an act.[45] Not all forms of discrimination attract legal protection, or would indeed necessarily be considered to be wrongful, and, in the context of the ECHR, for example, and as mentioned above, it is well established that the protection from discrimination under Article 14 is not a freestanding right, and must be used in conjunction with another substantive provision in the Convention.[46]

Stigma can thus be understood as going beyond negative stereotyping and prejudice.[47] It is also conceptually distinct from discrimination, as the latter involves actual treatment, and discrimination can occur because of stigma, but not necessarily. The term stigma originates from the same Greek roots as in the verb 'to stick', meaning to pierce, or to tattoo,[48] and it is associated with the idea of a 'mark', or a branding, or a label, that distinguishes an individual from others, and in a way that is widely recognised and supported in society. In his seminal work on stigma, Erwin Goffman writes how for the Greeks the term stigma referred to 'bodily signs designed to expose something unusual

[37]Ibid, at 709.

[38]Solanke, above n 35, p 9, citing R Bennett 'Young, white British males really do have a bad name' (*The Times*, 17 December 2015).

[39]Solanke, above n 35, pp 9–10.

[40]C MacKinnon 'Substantive equality revisited: a reply to Sandra Fredman' (2016) 14 International Journal of Constitutional Law 739 at 741. Here there are also issues to consider about intersectionality; see for example S Atrey *Intersectional Discrimination* (Oxford: Oxford University Press, 2019).

[41]GM Herek 'Thinking about AIDS and stigma: a psychologist's perspective' (2002) 30(4) The Journal of Law, Medicine & Ethics 594 at 595.

[42]Solanke, above n 35, p 9.

[43]Herek, above n 41.

[44]Solanke, above n 35, p 21.

[45]Herek, above n 41, at 595.

[46]ECtHR 'Guide on Article 14', above n 10.

[47]N Mehtaand and G Thornicroft 'Stigma, discrimination, and promoting human rights' in V Patel et al (eds), *Global Mental Health: Principles and Practice* (New York: Oxford University Press, 2014).

[48]Herek, above n 41, at 594.

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and bad about the moral status of the signifier' and that the 'signs were cut or burnt into the body and advertised that the bearer was a slave, a criminal, or a traitor – a blemished person, ritually polluted, to be avoided, especially in public places'.[49] The term has not always had entirely negative connotations, and the earliest recorded use of the word stigma in English referred to religious *stigmata*, which were seen as positive and a sign of holiness.[50] In modern use, however, the word has negative connotations that refer back to its origins.

In a highly influential article on the definition of stigma, Bruce Link and Jo Phelan explain how a move towards stigmatisation includes negative stereotyping, but also goes beyond this to include disadvantageous outcomes, in the context of an imbalance of power. For them, stigma exists when certain interrelated components converge.[51] First, individuals identify and name human differences. Secondly, dominant cultural beliefs tie labelled persons to negative stereotypes. Hence in *Grzelak v Poland*,[52] the fact a pupil who did not want to study classes on religion was given a blank mark in their formal records was a 'form of unwarranted stigmatisation',[53] which breached Articles 9 (on freedom of thought, conscience and religion) and 14 of the ECHR. The Court placed particular weight on the fact that the absence of a mark had a specific connotation and distinguishes the persons concerned, and that this has 'particular significance in respect of a country like Poland where the great majority of the population owe allegiance to one particular religion'. Thirdly, labelled persons are categorised in groups, which creates a division between 'us' and 'them'.[54] Fourthly, labelled persons experience 'status loss and discrimination' which lead to inequality in outcomes. Finally, the authors say that stigma occurs 'in a power situation that allows the components of stigma to unfold', and that

> stigmatization is entirely contingent on access to social, economic, and political power that allows the identification of differentness, the construction of stereotypes, the separation of labelled persons into distinct categories, and the full execution of disapproval, rejection, exclusion, and discrimination.[55]

Thus, stigma – on this understanding – involves not just a negative judgment and categorisation, but is linked to power: in particular, the power of a person in authority to determine the groupings of society, the negative associations attached to those groupings, and the allocation of membership. As Barnett et al explain, stigma can be seen as a form of social control.[56]

Having said this, an instance of stigmatisation is not *necessarily* wrong. We can think that it is legitimate, for example, that the labelling of criminal offences, or of people as criminals, should be stigmatising. We note as well that references to stigma do not always refer to the concept as outlined above; sometimes, there is a reference to the stigmatisation of an individual without the need for group membership, or the term is used more broadly in the absence of power.

There is a further important aspect of stigma which we wish to highlight. For many – maybe all – people, their identities are formed though associations and relationships with others, be that as a member of a family, a social club, or a religion.[57] These associations are important for building up solidarity, combatting loneliness, and giving people a sense of value. Associating with others who

[49]E Goffman *Stigma: Notes on the Management of Spoiled Identity* (London: Penguin Classics, 2022) (first published: USA: Prentice-Hall Inc, 1963) p 1.

[50]Herek, above n 41, at 594.

[51]B Link and J Phelan 'Conceptualizing stigma' (2001) 27 Annual Review of Sociology 363 at 367.

[52]Application No 7710/02 (15 June 2010).

[53]Ibid, para 99.

[54]On making people 'other' in the disability context, see for example S Wendell 'Toward a feminist theory of disability' (1989) 4(2) Hypatia 104.

[55]Link and Phelan, above n 51, at 367.

[56]JP Barnett et al 'Stigma as social control: gender-based violence stigma, life chances, and moral order in Kenya' (2016) 63(3) Social Problems 447.

[57]J Herring *Law and the Relational Self* (Cambridge: Cambridge University Press, 2020) ch 1.

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have similar interests, beliefs, or culture can provide a significant source of support. In stigmatisation, however, these associations are turned as tools against the individual members. The associations which should be a source of pride, reassurance and value are manipulated by those with power to disadvantage their members. There is, therefore, a very particular social harm which stigmatisation produces. In fact, on some accounts, what matters most to us in life is our relationships, and perhaps our most commendable human characteristics involve a wish to care for others. The 'marking out' and exclusion that results from stigma is completely at odds with this, and brings out instead, perhaps, some of our worst human tendencies. Instead of people coming together, stigmatisation pulls people apart.

We might therefore add another reason why stigma is a particularly helpful concept in understanding the evolution of jurisprudence, which is that stigma seems to constitute an especially strong form of dignitary harm. Human dignity is often thought to be the foundation for human rights,[58] but at the same time it is notoriously difficult to define, and can be criticised for being too uncertain.[59] Sandra Fredman suggests that dignity can be given specific content through a focus on the harms of stereotyping, prejudice, and stigma,[60] although, as we have seen above, there are reasons to think that stigma appears to be the most harmful. Indeed, Solanke suggests that stigma can be particularly theoretically important in understanding anti-discrimination law. Whereas traditionally discrimination focuses on individual harm, 'stigma by definition throws a spotlight on society'.[61] Stigma highlights how the devaluation of a person results from a collective process that is socially maintained.[62] As Rosemarie Garland-Thomson has said, stigma theory 'reminds us that the problems we confront are not disability, ethnicity, race, class, homosexuality, or gender; they are instead the inequalities, negative attitudes, misrepresentations, and institutional practices that result from the process of stigmatisation'.[63] As such, combatting stigma should be seen as the responsibility of society, and measures need to be taken at the public level.[64] This means that group identity and support can return to their rightful positive role.

(b) Stigma in ECtHR case law, and the scope of Article 8

Having looked at the theoretical material around stigma, if we return now to some of the ECtHR jurisprudence we discussed above, we think that insights on the concept of stigma can help us understand the Court's analysis. With respect to the repeated references by the ECtHR to the need for the negative expression to reach a 'certain level' of seriousness, as we analysed above, we suggest that it would be unlikely that this level would be reached in the absence of stigma, even if the analysis is not expressly centred on this. In particular, while the Court in *Aksu* referred to 'any negative stereotyping of a group', it might be thought that this cannot refer to just any group; for the stereotyping to be sufficiently serious, one could think that the group needs to be one that is already stigmatised, even though this is not what the Court specifically said. Thus, even when the Court's analysis was not centred explicitly on stigma, it appears that a focus on the concept of stigma can better explain the development of the jurisprudence.

The cases themselves do seem to be concerned with stigma. For example, in *Aksu*, while a violation of Article 8 was not found in that case, there seemed to be no doubt that there was stigmatisation of the Roma community. Stigma also seemed to be relevant in *F.O. v Croatia*[65] and *Beizaras and Levickas*

[58]For discussion see J Waldron 'Is dignity the foundation of human rights?' in R Cruft et al (eds) *Philosophical Foundations of Human Rights* (Oxford: Oxford University Press, 2015).

[59]For discussion see for example Solanke, above n 35, p 54.

[60]S Fredman *Discrimination Law* (Oxford: Oxford University Press, 3rd edn, 2022) ch 1 and in particular pp 28 and 35.

[61]Solanke, above n 35, pp 81–82.

[62]R Garland-Thomson *Extraordinary Bodies: Figuring Physical Disability in American Culture and Literature* (New York: Columbia University Press, 1997) p 31.

[63]Ibid, p 32.

[64]Solanke, above n 35.

[65]Above n 22.

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v Lithuania.[66] In the former case, the teacher had used offensive terminology relating to those with mental disabilities, and in the latter case, offensive terms were used about the gay community. In both cases the terminology was used to draw on negative attitudes towards a group, as a method of targeting the individual. This challenged their identity and dignity, not just by causing them offence, but by denying their individual identity and dignity as separate individuals. They were treated as 'one of those kind of people' rather than valued and recognised as a person with their own identity.

Lewit, however, is perhaps a case where it is less obvious that there was stigma, as it is not clear that survivors of a Nazi concentration camp suffer structural disadvantage throughout society.[67] However, one might think that a community should be particularly keen to avoid perpetuating negative stereotypes about those who already suffered through one of the most reviled regimes in modern history. Although this cannot be clearly concluded from the reasoning in the judgment itself, perhaps there could be a concern in this context that even any beginning of stigmatisation needed to be most swiftly stamped out.

With all these considerations in mind, it does seem that a claim under Article 8 based on negative expression might best be understood as often relating to a right to live without stigma. While a group's 'history of stigmatisation' was mentioned as only one factor among others in *Budinova and Chaprazov* and *Behar and Gutman*,[68] and although the Court did not say that stigmatisation is absolutely required, the identification of stigma might well be often required in order to place a limit on a right which could otherwise seem excessively broad. This approach could also better reflect the most important harm at issue. Perhaps, it is fair to say that it is not inconceivable that a case could succeed where there is no stigmatisation, if the negative expression was otherwise especially serious, and as the decision in *Lewit* might suggest, but the number of any such cases would seem limited.

A focus on stigma under Article 8 would also, we think, follow on from an interpretation of key wording in the article, through the expression 'private life', and the significance of the word 'respect'. First, in relation to 'private life', it is important to note that Article 8 has been interpreted broadly. The ECtHR has explained that this article 'covers the physical and psychological integrity of a person' and 'can therefore embrace multiple aspects of the person's physical and social identity', and that it 'protects in addition a right to personal development, and the right to establish and develop relationships with other human beings and the outside world'.[69] In fact, the concept of 'private life' goes even further than this because the ECtHR has stated that Article 8 is concerned with protecting a person's right to identity.[70] While these statements are not on stigma directly, they would be in line with the protection against stigmatisation.

Secondly, with regard to the word 'respect', we note that the use of this particular term has not received the attention it deserves.[71] It is important to emphasise that Article 8 is not only concerned with 'private life' but with *respect* for private life, and that we should, therefore, consider specifically the meaning of the word 'respect'. Thomas Hill, for example, writes that 'respect … is something to which we should presume every human being has a claim, namely full recognition as a person, with the same basic moral worth as any other'.[72] Robin Dillon suggests that there can be four dimensions to respect.[73] First, there are cognitive dimensions: respect involves a belief or acknowledgement that an item deserves respect. Secondly, she argues that there is an affective dimension: respect involves an emotion or feeling. Thus, respect involves more than simply an intellectual acknowledgement of value, but includes a feeling or emotion towards the thing. Thirdly, there is a conative dimension:

[66]Above n 18.
[67]Above n 12.
[68]*Budinova and Chaprazov*, above n 13, para 63, and *Behar and Gutman*, above n 14, para 67.
[69]*Denisov v Ukraine* Application No 76639/11 (25 September 2018) para 95. See also *Pretty v UK* (2002) 35 EHRR 1 at [61].
[70]*Bensaid v The United Kingdom* [2001] 33 EHRR 10 at [45].
[71]J Herring 'Respecting family life' (2008) 75 Amicus Curiae 21.
[72]T Hill *Respect, Pluralism, and Justice: Kantian Perspectives* (Oxford: Oxford University Press, 2000) p 59.
[73]RS Dillon 'Respect' in EN Zalta and U Nodelman (eds) *The Stanford Encyclopedia of Philosophy* (Fall 2022 edn).

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respect motivates a person so that they are disposed to act, or not to act, in a way as a result of respect. Finally, she suggests a behavioural element: appropriate behaviour includes refraining from certain treatment or acting in particular ways that may be fitting, deserved by, or owed to the other.

If we combine the broad reading that can be made of 'private life', with the deeper appreciation we should have for the importance of 'respect', we can better understand the application of Article 8 in relation to stigma. First, as we have mentioned above, Article 8 imposes positive obligations on the state, and therefore respect can call for a positive response. Indeed, the ECtHR has said that positive obligations can be 'inherent in effective "respect" for private and family life'.[74] A requirement to respect is different from a requirement to tolerate, which might in colloquial terms mean putting up with, or seeking to ignore something. Respect, rather, requires a positive state of valuing. To give an example from everyday life, you might tolerate your neighbour's child's violin practice, but you would only respect it if you identified it as having value. By contrast, while you might also tolerate your neighbour's decision to shout at the television, it is quite unlikely that you would respect it. Secondly, this understanding has particular significance when thinking of an individual's identity and moral integrity, because respect requires the state to value each citizen's own sense of self and dignity.[75] Thirdly, when we are considering whether the stigma is sufficiently serious to raise Article 8 issues, it is important to appreciate that the bar is not starting at neutral. Because stigma must be socially supported, the state can also be said to bear some prior responsibility for the stigma present in society, even if this is not recognised in the form of the breach of an individual right. The state which is stigmatising, or not taking steps to prevent stigmatisation, has not only breached Article 8 by positively engaging in stigmatisation, but it might also have failed to positively act to promote a recognition of the value of the individual's identity and dignity.

In other words, a right to live without stigma would highlight the state's responsibility in a particularly powerful way, because any identified violation based on stigmatisation reveals not only one, but potentially two failures from the state. There is, more narrowly, an individual harm that results from either the state's direct perpetuation of stigma, or from a failure of the state to fulfil its positive obligations in relation to third-party stigmatisation. But there is probably also another, and prior, failure, which is that the state might have already been supporting the existence of stigmatisation. A particular instance can only perpetuate, or reinforce, existing stigma that reflects a societal wrong. There will be no violation of a right to live without stigma if there was not already stigma within society, given that stigma must by definition be socially supported. Given that the concept of stigma is focused on societal responsibility, it is a harm that is particularly appropriate to consider in the context of the state's human rights obligations, and, as mentioned above, based on a concern for human dignity.

3. Stigma and the law's message in *Crowter*

While the recognition of a right to live without stigma can address significant individual harms and societal wrongs, it nevertheless requires some care and there will be issues that the courts will need to address in its development. In order to understand the scope of protection against stigma under Article 8, it is particularly helpful to examine the recent domestic case of *Crowter*. It is a case that refers to some of the ECtHR decisions we have analysed above, but it is also different from it in three notable ways. First, *Crowter* was a case on abortion, which raises distinct sensitive issues. Secondly, the appellants' claim was not based on the state's obligations to protect them from negative comments of third parties, but based on negative stereotyping perpetuated by the state itself through a legislative provision. Thirdly, the alleged stereotyping was said to result from a 'message' in the law, but this message was only implicit, and not explicitly articulated.

[74] *Király and Dömötör v Hungary*, above n 12, para 60. See also *Söderman v Sweden* Application No 5786/08 (12 November 2013) para 78.

[75] It may be that there are some forms of identity which fall outside the scope of Art 8; Jonathan Herring, above n 71, has suggested that there may be some forms of relationship which fall outside the definition of family life because they cannot deserve respect (eg child abuse). We do not pursue that here (a paedophilic identity might be an example).

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We will examine, here, the significance of these different factors, and we suggest that, once again, the concept of stigma will be helpful: it will allow us to understand both how the relevance of these distinctive features in *Crowter* might be assessed, and what could be the future development of case law on negative expression.

(a) Crowter, and new directions on stigma

As mentioned above, in *Crowter* the appellants argued that the disability ground in the Abortion Act 1967 expresses a 'message' which perpetuates and reinforces negative stereotypes about them and about other disabled people. They argued that this infringes their rights under Articles 8 and 14 of the ECHR, and they relied on *Aksu* and *Lewit*. The disability ground in question, section 1(1)(d) of the Abortion Act 1967, provides that an abortion can be lawful if 'there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped'.[76] Section 1(1)(d) is unlike the other grounds in the Abortion Act, as it is the only ground that singles out the child's future characteristics (ie disability) as a reason for abortion, whereas all the other grounds are based on a health risk.[77] This section also provides a ground until birth, whereas the vast majority of abortions are subject to a 24-week time limit.[78] The appellants' arguments in *Crowter* were in line with long-standing criticism in the academic literature, based on the expressivist objection, that disability-selective abortion and prenatal testing can 'express' the message that disabled lives have lesser value.[79] Importantly, while rights-based arguments in the abortion context are usually about the rights or alleged rights of the pregnant woman or the foetus,[80] these rights were not directly at issue in the appellants' arguments, because their case was that the negative message in the law interfered with the rights of disabled people.

All three justices agreed to dismiss the appeal, with none of them finding that there was an interference. Underhill LJ, writing the lead judgment, thought that section 1(1)(d) could be seen as concerned with the foetus, and therefore does not clearly send a negative message about people with serious disabilities, viewed as a separate group. He distinguished the case from *Aksu* and *Lewit* on the basis that those cases concerned applicants who were themselves members of a stereotyped group. According to Underhill LJ, the perception that the provision concerns the appellants is not unequivocal, because other people 'draw a clear line at the moment of birth and deny that permitting the abortion of a foetus with a serious disability implies anything about the value of the lives of the living disabled'.[81] This conclusion is very difficult to accept, as it seems quite obvious that a distinction between which foetuses can be aborted, based on a particular characteristic, would reflect a message about those people living with the same characteristic.[82] Indeed, Jackson LJ took a different view in

[76]The Abortion Act 1967 provides grounds where abortion can be lawful, whereas the default position in the law is that abortion is otherwise a criminal offence. The main statutory provisions are under sections 58 and 59 of the Offences against the Person Act 1861, and also relevant is the Infant Life (Preservation) Act 1929.

[77]See the Abortion Act 1967, s 1(1)(a)–(c).

[78]Under the Abortion Act 1967, s 1(1)(a). On the common use of this ground see H Robinson 'Prenatal testing, disability equality, and the limits of the law' (2023) 29(3) The New Bioethics 202 at 206.

[79]On the expressivist objection see for example E Parens and A Asch 'The disability rights critique of prenatal testing: reflections and recommendations' (1999) 29(5) Hastings Center Report S1 at S2. Further, a compelling examination of the difficulties in finding an ethical justification is found in S Sheldon and S Wilkinson 'Termination of pregnancy for reason of foetal disability: are there grounds for a special exception in law?' (2001) 9 Medical Law Review 85. For further critiques of problems with s 1(1)(d), and its negative messaging about disability see S McGuinness 'Law, reproduction, and disability: fatally "handicapped"?' (2013) 21 Medical Law Review 213; H Robinson 'Abortion on the basis of a risk of disability: the parents' interests and shared interests' in AM Phillips et al (eds) *Philosophical Foundations of Medical Law* (Oxford: Oxford University Press, 2019); and Robinson, above n 78.

[80]See for example *Vo v France* Application No 53924/00 (8 July 2004); *A, B and C v Ireland* Application No 25579/05 (16 December 2010); *Re Northern Ireland Human Rights Commission's Application for Judicial Review* [2018] UKSC 27 (*NIHRC*).

[81]*Crowter*, above n 2, at [72].

[82]This is particularly because ground (d) refers to 'the substantial risk that if the child were born it would' have a serious disability. The ground explicitly relates to a born child with disability and so cannot be taken to be only saying things about

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this case. While he also dismissed the appeal, he said that he was 'inclined to accept that section 1(1)(d) plays its part in contributing to discriminatory public attitudes', and that 'institutional stigma', which can be found in legislation, 'has a powerful role to play in either countering or promoting and maintaining negative stereotypes, prejudice and discrimination'.[83] In his view, however, ultimately the impact of section 1(1)(d) was not sufficiently serious to reach the level of an interference with Article 8.

Although the fact that this case was on abortion need not have mattered directly to the points above, or directly to an interpretation of an allegedly negative message in the law, it is possible that, inevitably, this categorisation coloured the analysis of the case. Importantly, however, and despite the controversial nature of discussions on abortion, the issues surrounding the disability ground are neither 'pro-choice' nor 'pro-life', and it would be possible to remove this ground without restricting access to abortion for this reason.[84] Either a law which forbade all abortion or one which permitted abortion for any reason prior to birth would avoid the expressivist objection, because in neither case would disability be singled out as a justification for abortion. If the law became more liberal, for example, and abortion was allowed for any reason at any stage of pregnancy, or for any reason until a particular time in pregnancy, this would not single out disability.[85] Of course, abortions on the grounds of disability could continue to take place, but they would not be recognised or justified as such by the law, and thus the law would not be sending the same 'message'. Unfortunately, the Court in *Crowter* did not seem to recognise that liberal options could address stigmatisation.[86]

Indeed, this approach reflects a common misunderstanding that there is necessarily a tension between arguments made to challenge a disability ground in abortion, and arguments based on women's reproductive autonomy. Given that abortion stigma is a significant harm faced by women,[87] it might seem that a concern to combat stigma leads to a tension between addressing the stigmatisation of two different groups. This might also seem to lead to a conflict of interests, because it has already been recognised that women have certain abortion rights protected under Article 8 of the ECHR, whereas the unborn do not, although moral considerations for the unborn are nevertheless relevant.[88] The removal of a stigmatising disability ground through a more liberal regulation of abortion could, however, combat stigmatisation against both women and disabled people. Therefore, the fact that the case was on abortion should not have been a bar, in itself, to the case succeeding, and the abortion rights of women under Article 8 need not necessarily lead to a conflict requiring a balancing of interests between these two groups. In fact, legal reform on the regulation of abortion, if seeking to address the disability ground through a liberal option, could combat stigma in more ways than one.[89]

foetuses in general: on this point see also H Robinson 'Discrimination in abortion law and the message the law is sending: *R (Crowter) v Secretary of State for Health and Social Care*' (2024) 87(1) Modern Law Review 218.

[83]*Crowter*, above n 2, at [130].

[84]On this point see also Robinson, above n 82.

[85]For an argument on decriminalisation, see S Sheldon 'The decriminalisation of abortion: an argument for modernisation' (2016) 36(2) Oxford Journal of Legal Studies 334. See also S Sheldon and K Wellings (eds) *Decriminalising Abortion in the UK: What Would It Mean?* (UK: Policy Press, 2020). On why the problematic scope of s 1(1)(d) can be used as a catalyst for more dramatic changes in abortion law, see also McGuinness, above n 79.

[86]It appears that the Court did not consider liberal options, as they might not have been presented to the court by the appellants: see *Crowter*, above n 2, at [32].

[87]There is significant literature on abortion stigma. See for example A Kumar et al 'Conceptualising abortion stigma' (2009) 11(6) Culture, Health & Sexuality 625; E Millar 'Abortion stigma as a social process' (2020) 78 Women's Studies International Forum 102328; AJ VandeVusse et al '"Technically an abortion": understanding perceptions and definitions of abortion in the United States' (2023) Social Science & Medicine 335.

[88]For discussion see for example *Crowter*, above n 2, at [36]–[41]. See also *NIHRC*, above n 80. For ECtHR jurisprudence, see for example *A, B and C v Ireland*, above n 80; *M.L. v Poland* Application No 40119/21 (14 December 2023).

[89]It seems that an argument could be made that the regulation of abortion through the criminal law, or the criminalisation of women, might itself constitute a stigmatising 'message' against women, based on abortion stigma. This argument would require additional consideration, and it would face the difficulty that we do agree, as said above, that stigma should attach to criminal actions. If we think that abortion should be decriminalised, however, or that women having abortions should not

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Similarly, the second distinctive factor in *Crowter*, as mentioned above, should not be seen as an obstacle to a claim's potential success. The fact that the case concerned a negative message in the law, rather than the negative expression of third parties, would seem to provide an even stronger reason for an interference to be found. This view can find support in *Crowter*, as Underhill LJ did not seem to think that the alleged message's origin in the law was a reason, in itself, for the case not to succeed,[90] and for Jackson LJ, the fact that the provision at issue is in a significant statute was a point in favour of the appellants.[91] If it is particularly important that high-ranking public officials avoid making certain types of negative statements as these can be perceived as representing the state's official position, as was said in *Nepomnyashchiy*,[92] surely there is reason to be concerned about a stigmatising legislative provision in an important statute. Further, if we are concerned with the law, there is no need to consider any conflicting rights to freedom of expression.

A potentially important difficulty, however, might be found in the third factor, which is that the claim in *Crowter* was not based on an expressly offensive statement, as was the case in ECtHR jurisprudence examined above. The provision at issue, section 1(1)(d) of the Abortion Act 1967, does not explicitly articulate a negative stereotype or a stigmatising statement. While the appellants argued that the provision is 'sending a message' that disabled lives have less value,[93] the provision does not explicitly articulate this view, and some interpretation is required in order to understand this message. It is true that this legislative provision does contain some language that some people would now find offensive and out of date, like the word 'handicapped' rather than 'disabled', as well as 'physical or mental abnormalities', and the words 'risk' and 'suffer'.[94] This terminology was addressed in the case, but it does not seem that the claim itself was centred on the use of these words, as it was rather about the *existence* of a specific ground that singles out disability, and that allows abortion for this reason until birth. Even if the language had been different, it appears that the claim could still have been made in a similar manner.[95]

This is an especially significant point to address, as it might seem that the scope of Article 8 could be too far-reaching if it is able to cover even unarticulated 'messages' that certain parties detect within the law. Prima facie at least, it would seem that the law sends all sorts of negative 'messages'. However, the comments from Underhill LJ would appear to leave the door open to the possibility that, in a different case, such a message could be found to interfere with Article 8. He said that the appellants' argument was that the law 'clearly, even if implicitly, disseminates a negative stereotype about the living disabled',[96] but he did not himself find that the alleged negative message was objectively clear, given that, as mentioned above (although unconvincingly in our view), he thought that the legal provision was not clearly concerned with disabled people. According to Underhill LJ, 'the interference must derive from something in its terms or its effect which, applying an objective standard, unequivocally conveys that message', and that '[t]he existence of a legal right cannot depend solely on the subjective perception of the putative victim'.[97] He further said that 'it would have very undesirable

themselves be subject to criminal sanctions, the law might be thought to send a stigmatising message of a kind that could interfere with Art 8. We thank one of the anonymous reviewers of this paper for drawing our attention to this line of argument.

[90] *Crowter*, above n 2, at [75].

[91] Ibid, at [130].

[92] *Nepomnyashchiy v Russia*, above n 30, para 75.

[93] *Crowter*, above n 2, at [3].

[94] Ibid, at [54].

[95] A different kind of case on offensive language and disability, that would be more similar to the existing case law from the ECtHR, would therefore be one that challenged an explicit statement from a third party as having itself a stigmatising meaning. We might think, for example, of a claim involving very hurtful language about disability. Although we leave these discussions aside for another time, an example where such a claim could be thought to materialise would be in relation to the use of the word 'retardation', which is widely considered to be deeply offensive and stigmatic, but which nevertheless continues to be used. On stigma and this word, and efforts to change terminology see J Herring et al 'Use of "retardation" in FRAXA, FMRP, FMR1 and other designations' (2022) 11 Cells 1044.

[96] *Crowter*, above n 2, at [71].

[97] Ibid, at [73].

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consequences if the perceived implications of a statement or measure, rather than its explicit or otherwise unequivocal meaning, could constitute an interference with Article 8 rights'.[98] Thus, his analysis suggests that a message (including one resulting from a 'measure') could constitute an interference in a different case, so long as it was sufficiently negative according to an objective interpretation.

Indeed, Underhill LJ further said that 'it is not impossible to conceive of legislation which did directly and unequivocally promulgate a negative stereotype of the kind with which *Aksu* was concerned'.[99] Certainly, there is no reason to think that an implicit message would necessarily be less stigmatising than an explicitly articulated statement. At the risk of sounding offensive ourselves, but to put it rather bluntly, we could imagine what our reaction would be if the law on abortion was amended so that it permitted abortion in only two cases: if there was a health risk to the pregnant woman, or if the child will not be white.[100] Clearly, we would think that the law was sending a strongly negative message in this case, and surely we would not think that it was only concerned with the unborn. Although determining whether a message is sufficiently seriously negative to rise to the level of an interference could in some instances prove difficult, we suggest, once again, that it is the concept of stigma which is likely to be the most helpful.

(b) Identifying the harm in stigma

While we have argued that the concept of stigma is particularly helpful to understand the case law in both *Crowter* and in ECtHR jurisprudence, we would like to address here how one particularly strong reason for referring to stigma might in fact be interpreted as a weakness. This line of interpretation comes from *Crowter* itself.

One difficulty in cases on stigmatic expression under Article 8, and one that did arise for the appellants in *Crowter,* is that there can be a difficulty in identifying the harm that comes from a particular instance of stigmatising expression. In *Crowter*, one of the reasons for dismissing the case was that it was not shown that negative attitudes towards disabled people were particularly as a result of this provision. The prevalence of prejudice might even have counted against the appellants, in a sense, as Underhill LJ refused to find a causal link between the disability ground in the Abortion Act and this widespread prejudice, saying instead that 'it seems rather unreal to attribute a significant effect to a recent legislative provision which most people rarely encounter and whose full extent few will appreciate', and that while the provision might be said to reflect long-established prejudices, this does not mean that it causes or substantially contributes to them.[101]

In other words, given that widespread prejudice and stigma surrounding disability cannot be attributed solely to the disability ground in the law on abortion, it might seem that this ground cannot serve as a kind of peg on which to hang these wider harms. As we have said above, given that stigma is by definition socially entrenched, any incidence of stigmatisation will necessarily reflect a pre-existing state of affairs. A particular violation might only follow on from the perpetuation or reinforcement of existing stigma. In our view, however, we think that this should not in fact be a reason to dismiss a focus on stigma as the relevant harm. If, by contrast. a provision caused offence but was unrelated to widespread prejudice and stigma (such as, for example, one targeting young, white British men, to repeat the above example), it might also be unlikely to succeed. In such a case, a court might find that the threshold of seriousness is not reached. The strongest view here appears to be that there is no reason to discount the focus on stigma, and that it is possible that the reasons in *Crowter* in this regard are at odds with some of the case law from the ECtHR. In *Budinova and Chaprazov* and *Behar and Gutman v Bulgaria*, for example, the pre-existence of anti-Roma and anti-semitic

[98]Ibid, at [74].

[99]Ibid, at [75].

[100]For a similar example, and more analysis of this point, see Robinson, above n 82. As discussed in more detail in that piece, it is true that there are reasons why it might seem less obvious that singling out disability is stigmatising, although we do not seek to review the reasons in *Crowter* in full here.

[101]*Crowter*, above n 2, at [58].

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prejudice did not seem to create a difficulty to the claims succeeding. Indeed, as we have said above, one of the advantages of focusing primarily on stigma is precisely that this can draw our attention to society's responsibility for pre-existing stigma, and not only to the individual violation, even if it is only the latter that is directly at issue in a case.

It is also not clear how we should evaluate the fact that not all people are aware of section 1(1)(d), which is a factor that seemed to count against the appellants, judging from the above-mentioned comments made by Underhill LJ. If we are concerned with the impact on identity and dignity, the number of people who are stigmatised or who know about the stigmatisation might be less significant than the power involved and the importance of this impact in a person's life. Ironically, it is perhaps due to widespread stigma surrounding disabled people that many people do not know about the legislative provision, or do not think it sends a pejorative message. If the law was amended such that it included a ground for abortion based on race, or female sex, surely we would immediately turn our minds to it.

While we do not seek to evaluate fully here the decision in *Crowter*, it seems that there are reasons to think that the appellants had, in fact, a strong case to say that the disability ground is stigmatising, and that the Court could have recognised the negative message expressed by the law as an especially strong, and uncommon, example of the type of 'message' that could fall within the reach of Article 8.[102] At the time of writing, it appears that the appellants intend to bring their case to Strasbourg, and so it might be that the matters in this case will receive further judicial consideration.

Conclusion: righting the wrong of stigma

Although there is some uncertainty about the scope of the right we have been examining, it is clear that the increasing recognition that negative expression can cause real harm which should be addressed through Article 8 is a significant development in Strasbourg jurisprudence. Recent cases suggest that the protection from negative statements and other expression, and potentially the state's responsibility for negative messages more broadly, could have a far-reaching effect, although perhaps not as far-reaching as it might seem. As the jurisprudence in this area is developing, we have suggested that the concept of stigma would be particularly helpful. It would be in line with much of the concerns identified in the existing case law and would bring into focus real wrongs that are at issue. It could also help explain why some negative statements are more serious than others, and which ones more rightfully call for state action, and it would provide some justifications for certain limitations to the right.

As we mentioned above, the recognition of a right to live without stigma, in the context of negative statements under Article 8, and with potential application more broadly to messages, would also highlight the state's responsibility in a particularly powerful way, because a violation would indicate not only one, but two failures from the state or society: based on the violation itself, and also based on the pre-existence of stigma, which, as we have explained, should be understood as necessarily socially supported. This also means that the recognition of a right to live without stigma can accomplish two beneficial purposes: it could help direct the development and interpretation of case law in the ECtHR and under Article 8 based on a recognition of the responsibility of the state to address the harm of stigmatising expression to individuals, in particular instances, and it can also signal how combatting the wrongs of stigma is society's, and the state's, responsibility. This means that the state should not only be taking steps to provide redress to individuals who have been harmed through stigmatising expression, but should also take steps to combat stigma more broadly.

We have not considered in detail, in this paper, the relevance of stigma in a number of other contexts, including under other articles of the ECHR. It might be that the recognition of the wrongs of stigma under the Convention could be wider still. As mentioned above, there are also important issues to consider in relation to free speech, and these deserve additional consideration, although free speech matters will not necessarily be at issue when the stigma is directly originating from the state. If there is

[102]For an argument that the Court should have recognised that the law does send a negative message, and that it would have been open to the Court to find that this message interferes with Art 8, see Robinson, above n 82.

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a right to live without stigma not only in the context of statements that perpetuate negative stereotypes, and in the context of other stigmatising expression, but also in the context of negative but implicit messages, the scope of this right should certainly receive further attention. However, even the possibility of claims based on a wider range of negative messages need not necessarily be overly expansive in comparison with previous cases, and might more appropriately capture the harm at issue, if as the jurisprudence develops there is a focus on the concept of stigma.

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